Reading the charge, I can see that no provision in the Act has been contravened by the accused. No regulation made under section 2 or any rule under section 3 of the Act has been referred to which the accused are alleged to have failed to comply with. It seems to me that despite a previous case where I had occasion to set aside the conviction and ordered the return of the net to a trawler fisherman convicted a year or two ago, the fisheries department has not taken any action to regularise their actions with a view to controlling fishing or to fill the *lacunae* in existing law. I am told that there are many similar cases still pending at Telok Bahang.

The two accused pleaded guilty and section 299 of the Criminal Procedure Code says:—

"When an accused person has pleaded guilty and been convicted by a district court or police court on such plea there shall be no appeal except as to the extent or legality of the sentence."

The footnote to this section (*Mallal's* Criminal Procedure 3rd Edn. page 355) says:—

"A prisoner, who pleaded guilty to a charge which states no offence in point of law, and against whom the evidence also disclosed no offence, was permitted to appeal against the conviction, and sentence thereby following, and such conviction was quashed. [*Municipal Commissioners* v. *Chuah Seng and ors.* 2 Ky. (M.A.) 140. See also *Deya Singh* v. *de Cruz*, 1 S.S.L.R. 147].

Plea of guilty to what is not an offence does not bar the accused person of his right of appeal. A plea of guilty to what is not an offence is no plea at all. [*R.* v. *Lim Soh Chwee and anor.*, Cr. App. (Singapore) No. 3 of 1911].

Where an accused person has been convicted by the magistrate on his own plea of guilty and is precluded from appeal against the legality of the sentence under this section, the appellate court can always in a proper case exercise its powers of revision under the Criminal Procedure Code [*Lee Yu Fah* v. *Public Prosecutor* [1937] M.L.J. 179.]"

This, I propose to do.

In regard to the second charge, I have also this observation to make, namely, that non-production of the licence in proof of the condition of the licence which he is supposed to contravene namely, as alleged, trawling outside the demarcation area, is fatal as there is no evidence that 4 miles from Muka Head is outside any demarcation area. Section 4(2) does not create any offence. The charge was also bad in law in the absence of express prohibition and any regulation under section 2 prescribing demarcation for the areas where trawler fishing may be permitted or rules by the State authority under section 3.

The first charge was against both accused but the amended charge was only in respect of the 2nd accused. I am not able to say if the 2nd accused was convicted also on the first charge but on the record a fine of $60 was imposed on the 1st and the 2nd accused. It does not appear what verdict was given on the second charge or whether any conviction or sentence was imposed on 2nd accused.

From the foregoing I am satisfied that no offence in law is disclosed and I accordingly set aside the conviction of both accused and direct that the fine of $60 imposed be refunded. I also direct that the sum of $60, which has been confiscated to revenue, be refunded to the accused. I may add $6 for 3 piculs of fish seem to be an unduly low price and wonder if perhaps this is lending encouragement to the victimisation of fishermen and I hope investigation would be made as it has been admitted there are numerous similar cases.

Conviction set aside, fine imposed refunded.

BOARD OF GOVERNORS OF SEKOLAH MENENGAH ST. GABRIEL v. RANJIT SINGH

[A.C.J. (Raja Azlan Shah J.) August 5, 1969]
[Kuala Lumpur — Civil Appeal No. 23 of 1969]

Practice and Procedure — Stay of proceedings pending declaratory suit in High Court — Discretion — principle applicable.

The appellants had filed a claim in the Sessions Court against the respondent for ejectment. The respondent had been employed as a watchman by the appellants and his services had been terminated. The respondent had been allowed in consequence of his employment to occupy a portion of the school premises rent free. In his defence the respondent alleged wrongful dismissal and averred that he was seeking a declaration to that effect in the High Court. The respondent filed a suit in the High Court for a declaration that the purported dismissal was *ultra vires* and null and void. He therefore applied to the Sessions Court for a stay of the proceedings and the learned president allowed the application.

Held, allowing the appeal: the learned president in this case had exercised his discretion on the wrong principle and in the light of all the relevant circumstances including the onus of proof, the fairest mode of trying the several disputes in this case would be for the action to proceed in the Sessions Court.

Cases referred to:—

(1) *Thomas* v. *The South Eastern Railway Co.* (1882), 9 Q.B.D. 320, 335.

(2) *Ramsbottom* v. *Snelson* [1948] 1 K.B. 473.

(3) *Thomson's (Funeral Furnishers) Ltd.* v. *Phillips* [1945] 2 All E.R. 49.

(4) *Kamuning (Perak) Rubber & Tin Co. Ltd.* v. *Abraham* [1965] 1 M.L.J. 20.

(5) *Anglo-Oriental Plantations Ltd.* v. *D'Cruz* [1967] 1 M.L.J. 83.

(6) *Francis* v. *Municipal Councillors of Kuala Lumpur* [1962] M.L.J. 410.

(7) *Addis* v. *Gramophone Co. Ltd.* [1909] A.C. 488.

MAGISTRATE'S CIVIL APPEAL.

Chin Yoong Chong for the appellants.

Joginder Singh for the respondent.

Raja Azlan Shah J.: On 3rd February 1968 the appellant board filed a claim in the Sessions Court against the respondent for an order for ejectment. The respondent was employed as a watchman and in consequence of his employment and for the more effective performance of his duties he was allowed to occupy a portion of the school premises rent free. On 31st March 1967 his services were terminated. The board employed a new watchman in his place. The respondent was asked to vacate the premises. He refused to do so. The defence allege wrongful dismissal and aver that the respondent is seeking a declaration to that effect in the High Court. In a cross-action filed on 18th March 1968 in the High Court the respondent sought a declaration that the purported dismissal was *ultra vires* and null and void and that he continued to be and still continues to be employed by the board. There is also an alternative claim for damages for wrongful dismissal.

An application was then made by the respondent presumably under clause 2(1) of the Third Schedule to the Courts Ordinance, 1948 to stay the Sessions Court proceedings pending the outcome of the declaratory suit in the High Court. The ground in support of that application was that the Sessions Court had no jurisdiction to hear a declaratory suit if he were to file a counter-claim in the court below. The learned president allowed the application on the following ground:—

> "The points to be decided in the High Court are similar to those raised in the Sessions Court. The defendent has in his statement of defence raised a triable issue that his purported dismissal was null and void and this same contention appears in the writ he had filed in the High Court when seeking a declaratory judgment to that effect."

I do not think the disputes which exist between the parties can possibly be decided by any hard and fast rule, such as that declared in *Thomson v. The South Eastern Railway Co.*[1] The principle there enunciated is based on the individuality of that case: no attempt was made to give an exhaustive classification of the cases where the principle should be applied. Indeed, it would be wrong to do so. That seems clear from the following passage of Holker L.J. at p. 335:—

> "In such a matter as this I cannot be confident, but it seems to me to be reasonable that the party to the litigation who has substantially everything to prove in it, and who would fail substantially unless the necessary evidence were produced, should be allowed to commence the proceedings at the trial, and to have the control of the action."

In that case Messrs. *T.* brought an action for the balance of the price of a steamship built by them for the defendant company. In a cross-action commenced some three days later, the defendant company as plaintiffs claimed a return of all the monies paid to them by Messrs. *T.* on account of the steamship and damages. Upon the facts the burden of proof lay upon the defendant company. It was held that as the burden of proof lay upon the defendant company, the action brought by them should be allowed to proceed, Messrs. *T.* should be at liberty to raise all questions by counter-claim and the action brought by them should be stayed.

I hold the view that a stay of proceedings is a matter of discretion and the court must exercise its discretion as to what is the fairest mode, upon taking all matters into consideration of trying the several disputes which exist between the parties. In one case one consideration may have more sway, more cogency, and more effect than that same consideration, perhaps, may have in another. Putting it in another way, the court must exercise its discretion whenever it is just and reasonable to do so.

It is clear that the respondent was a service occupant under a licence because he was required by the nature of his work to live there for the effective performance of his duties (see *Ramsbottom v. Snelson*[2]) and as such he has no right to remain on the premises once his contract of service is terminated (see *Thomson's (Funeral Furnishers) Ltd. v. Phillips;*[3] *Kamuning (Perak) Rubber & Tin Co. Ltd. v. Abraham;*[4] *Anglo-Oriental Plantations Ltd. v. D'Cruz*[5]). Therefore in my opinion the issue between the parties before the Sessions Court is whether by the terms of his contract of service there is created a tenancy or a licence. That is what the Sessions Court is being asked to decide. The respondent has admitted that he is a service occupant in his pleadings and on the face of it he has no valid defence. I am also informed that the case was filed in the court below in order to have a speedy trial in view of the urgency of the matter, that is, accommodation is urgently required for the new watchman and also to save costs.

The issue before the High Court is whether upon a purported termination of a contract of service a declaration can be made to the effect that such contract still subsists. In such an event different considerations apply, one being that in view of the nature of the contract of service specific performance will not be granted unless there exists special circumstances. A passage from the judgment of the Privy Council

in *Francis v. Municipal Councillors of Kuala Lumpur*[6] on page 410 is germane:—

"In their Lordships' view when there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principle of law that the courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the court."

Another consideration is that a claim for wrongful dismissal is limited to compensation for loss of emoluments which would have been earned but for the breach and which would include compensation for the loss of the use of the premises, and possibly a compensation in respect of the time which might have reasonably elapsed before the respondent can obtain employment (*Addis v. Gramophone Co. Ltd.*[7]).

In the light of all the relevant circumstances including the onus of proof which lies upon each of the plaintiffs in the two cases as contradistinct from the case of *Thomson v. The South Eastern Railway Co. supra*, where the substantial burden of proof of the whole lies upon the railway company, I consider the fairest mode of trying the several disputes which exist between the parties is that the board should be at liberty to proceed with its claim in the court below. Much of the consideration in the court below was dominated by the question that the points raised in both the pleadings are similar in nature. That is a wrong approach to the whole problem. It seems to me plain that the learned president had acted on some wrong principle. That was a wrong exercise of discretion. To bring the point home it must be re-stated that a stay of proceedings is a discretionary remedy to be exercised in accordance with well established judicial principles and that includes the principle that it should not cause injustice to the plaintiff.

I will therefore allow the appeal with costs. I further direct that the case before the lower court be tried as speedily as possible.

Appeal allowed.

Solicitors: *Skrine & Co.; Joginder & Rajadurai.*

LIOW SIOW LONG v. PUBLIC PROSECUTOR

[A.CrJ. (Raja Azlan Shah J.) August 8, 1969]

[Kuala Lumpur—Criminal Appeal No. 3 of 1969]

Road Traffic — Reckless driving — Sentence — Disqualification — Special grounds — Road Traffic Ordinance, 1958, s. 34A.

Evidence — Testimony of close relations — Competent witnesses.

Criminal Law and Procedure — Sentence — Extenuating circumstances — Consideration of.

This was an appeal against the conviction of the appellant on a charge of causing death by reckless driving under section 34A of the Road Traffic Ordinance, 1958. The appellant was sentenced to 6 months imprisonment and also disqualified from holding or obtaining a driving licence for 5 years. It was submitted on appeal that there was no evidence of reckless driving by the appellant.

Held, dismissing the appeal: (1) to bring home a charge under section 34A of the Road Traffic Ordinance in respect of driving recklessly it must be shown that the driving was such as to amount to rash driving and the driver of the vehicle must be heedless of the state of affairs on the road at the time in question;

(2) on the facts the learned president in this case was right in convicting the appellant; and as there was nothing to show that the sentence imposed was excessive, the appeal would be dismissed.

Case referred to:—

(1) *Seah Siak How* v. *Public Prosecutor* [1965] 1 M.L.J. 53.

MAGISTRATE'S CRIMINAL APPEAL.

Kam Woon Wah for the appellant.

Lim Beng Chooi (Deputy Public Prosecutor) for the respondent.

Raja Azlan Shah J. (delivering oral judgment): On the 24th of January 1969 the appellant was convicted of an offence of causing death by reckless driving under section 34A of the Road Traffic Ordinance, 1958 and was sentenced to six months' imprisonment. He was also disqualified from holding or obtaining a driving licence for a period of 5 years.

The only substantial ground of appeal is that the conviction was wholly against the weight of evidence as there was no evidence of reckless driving by the appellant.

The short facts as found by the learned president are as follows:—

On the 20th of March 1967 at about 5.50 a.m. P.W.1 and one San Yat Pah (one of the deceased persons) were travelling in a motor car M. 5395 being driven by one Lee Choo Chai, another of the deceased, from Kuala Lumpur to Betong. P.W.1 was seated at the back. It was still dark and the motor car had its headlights on. While it was travelling at 35 miles per hour at 2nd milestone Betong/Kuala Lumpur Road a motor lorry came from the opposite direction with its headlights on. It came at a fast speed and it also encroached into the path of the said car. As a result of this encroachment a collision occurred between the two vehicles and as a result San Yat Pah and Lee Choo Chai died on the spot.

In coming to the finding of fact the learned president relied on the evidence of P.W.1, P.W.2, P.W.3 and P.W.9.